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THE DEFINITION OF CRIMINAL RESPONSIBILITY.

THE UNWRITTEN LAW

The unwritten law is currently stated to be that the despoiler of a woman's virtue shall atone for his crime at the mouth of the shotgun in the hands of her male protector.

No thoughtful person on reflection will contend, that any such doctrine can bear a moment's recognition in any court. The constitutional guarantee, that no man shall be put to death except upon the judgment of his peers and according to the law of the land, is closely identified with every conception of Anglo-Saxon law. Century after century, often at the cost of precious blood, it has been handed down as the priceless heritage of the race. It has no exemptions. The rich and the poor, the high and the low, the saint and sinner are alike embraced.

No man, therefore, can constitute himself the judge, jury and executioner of any other no matter how much that other may have deserved death at his hands. From this it necessarily follows, that provocation can only be considered in mitigation and not as an excuse for homicide. Authority need hardly be cited for a principle so axiomatic, but nothing could be more apt than the opinion of the court in McWirt's Case, 3 Gratt. 606.

"In no instance, it has been observed, can the party killing alienate his case by referring to a previous provocation, if it appear by any means, that he acted upon express malice. * * * In the case of the most grievous provocation to which a man can be exposed, that of finding another in the act of adultery with the wife of the slayer, though it would be but manslaughter, if he should kill the adulterer in the first transport of passion, yet if he kill him deliberately upon revenge after the fact and sufficient cooling time it would undoubtedly be murder. * * *

"For let it be observed (says Foster) that in all possible cases deliberate homicide upon a principle of revenge is murder. No man under the protection of the law is to be the avenger of his own wrongs. If they be of a nature for which the laws of society will give him an adequate remedy, thither he ought to

report; but be they of what nature soever he ought to bear his lot with patience, and remember that vengeance belongs to the Most High."

The legal punishment for adultery or fornication is a fine and is a grossly inadequate punishment, when those crimes aggravated by base treachery, bring ruin to a happy home, dishonor to a proud name, and misery and wretchedness to innocent hearts. When such instances come into publicity everyone, indignantly and instinctively, if he has a touch of human sympathy in his heart, is ready to say, that the hangman's noose could be better applied as the remedy, than even in cases of willful, deliberate and premeditated murder. And yet when these crimes are but the mere commerce between two immoral creatures, every one is equally willing to admit, that the infliction of harsh punishment is practically impossible. There is no distinction in the law in these instances; perhaps it might be very difficult to make any. But it is this want of elasticity in the written statutes, that gives occasion for invoking the unwritten law and for the popular sentiment that not only condones, but, in many instances applauds that man, whom the letter of the law denounces as a murderer.

It is an undenied and undeniable fact that American juries will not punish the man, who kills another, if that other by aggravating and damnable treachery invades the sanctity of his home circle and destroys its peace.

Hail to that statesman, who will bring the statutes more into accord with the public sense of justice and right without surrendering any precious word or line or principle of the Bill of Rights.

Bold indeed however would that attorney be, who relied upon the unwritten law as a defense. He would be met by the interposition of the court with adverse rulings and instructions. He would be met by the oath of the juror to follow the instructions of the court. An able and conscientious lawyer must find some basis for an American jury to rest a verdict upon.

Often, perhaps too often, this is done by the interposition of the plea of insanity. At the same time it is hard to understand why any believer in the unwritten law should be offended thereby.

The burden is placed upon the defendant to show that he received a shock so overwhelming, that a jury can say his reason was overthrown and he was irresponsible. On the other hand there are members of the profession who believe in the strict maintenance of the law, even though it closes the penitentiary door upon the avenger of a woman's dishonor, and the destruction of the peace of his home. The plea of insanity seems to them too easy a loophole, through which violators of the law may escape. A court must, however, proceed upon general principles.

It becomes important therefore to consider the true measure of criminal responsibility.

LEGAL INSANITY

It goes without saying, that this standard of criminal responsibility must be fixed and unalterable as every other standard is and be alike applicable to all cases without regard to the facts of a particular case. A yard stick contains the same number of inches without regard to the cloth to be measured, and so this yard stick of criminal responsibility must be true without regard to the facts of the particular case to which it is to be applied. What is the true definition in one case must be true in every other. It does not necessarily coincide with the medical definition.

Before entering upon this inquiry let me say that I believe it will be found rarely if ever possible to apply the standard in any ruling on the admissibility of evidence. The condition of the mind at any particular moment is a question of fact, which it is the province of the jury to determine. The responsibility, which the law imposes attaching to that condition is a question of law for the court. The court can only, therefore, define the responsibility attaching to any condition of the mind by instructions, which the jury can only apply after it has heard the evidence.

THE DEFINITION OF INSANITY

Lord Coke wrote to exonerate from crime on account of insanity a man must be totally deprived of memory and understanding. Justice Tracey, as late as 1724, instructed the jury that to exonerate from crime the accused must be one totally

deprived of memory and understanding and doth not know, what he is doing more than an infant, a brute or a wild beast. Such a definition of crimnial responsibility departed into the shades of night with the advancement of science, civilization and the humanities.

But in 1843 a man by the name of McNaughten murdered a man, whom he mistook for the Prime Minister of England. His acquittal, on the ground of insanity so startled England, that the House of Lords propounded to the Judges of England, what definition of insanity should be given to juries in criminal trials upon the plea of insanity. The reply in this ruling and celebrated case, McNaughten's Case, 47 E. C. L. 129, is as follows:

"That to establish the defense of insanity it must be clearly proved, that at the time of committing the act the accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act, knew the difference between right and wrong, which mode though rarely, if ever leading to any mistake with the jury is not, as we conceive, so accurate, when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged."

This definition known as the "right and wrong" test has been followed by the appellate courts in quite a number of the states. It is briefly given in People *v.* Flanagan, 52 N. Y. 67, as follows:

"The capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of inquiry."

This definition is adopted by South Carolina, North Carolina West Virginia, Kansas, California, Georgia, Missouri, Mississippi, the United States Supreme Court, New Jersey and perhaps other states. But the courts of other states of the highest respectability insist, that there should be added to the definition, that the defendant should possess a will power sufficient to control the impulses arising from his mental derangement. This is called for brevity's sake the "irresistible impulse" test.

"One who commits a criminal act, moved thereto by an insane impulse controlling his will and judgment and too powerful for him to resist, arising from causes not voluntarily induced by himself, is not responsible," says one case. "The true test of responsibility is, whether the accused had sufficient reason to know right from wrong and whether or not he had a sufficient power of control to govern his action," says another.

See such cases using about the same phraseology: Gulb *v.* State, 117 Indiana 277; Parsons *v.* State, 8 Alabama 577; State *v.* Newhester, 46 Iowa 88; State *v.* Johnson, 40 Conn. 136; Fisher *v.* People, 23 Ill. 283; Jolly *v.* Commonwealth, 110 Ky. 190; State *v.* Jones, 50 N. H. 369; State *v.* Perl, 23 Mont. 358; Commonwealth *v.* Wiseback, 190 Pa. 138.

It would seem that the following states have adopted the "irresistible impulse" test: Alabama, Indiana, Ohio, Iowa, Kentucky, Tennessee, New Hampshire, Michigan, Connecticut, Montana, Illinois, Pennsylvania and perhaps other states.

With the courts in the latter class are the distinguished text writers, Bishop and Wharton. Wharton Hm., p. 574; 1 Wharton Crim. Law, p. 44; 1 Wharton S. Med. Pr., p. 147; 1 Bishop Crim. Law. In this last class of cases must also be placed Virginia.

THE DEJARNETTE CASE

In the Dejarnette Case, 75 Va. 867, the lower court gave the following instruction:

"But in every case, although the accused may be laboring under partial insanity, if he still understands the nature and the character of his act and its consequences and has a knowledge, that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know, that, if he does the act he will do wrong, and receive punishment, *and possesses withal a will sufficient to restrain the impulse, that may arise from a diseased mind,* such partial insanity is not sufficient to exempt him from responsibility to the law for his crimes."

This instruction in its exact words in so far as the definition of criminal responsibility is given may be expressed as follows (Instruction 20, Strother Case):

"An accused is responsible for crime, if he understands the nature and character of his act and its consequences, and has a

knowledge, that it is wrong and criminal and a mental power sufficient to apply that knowledge to his own case, and to know, that if he does the act he will do wrong and receive punishment, and *possesses withal a will sufficient to restrain his impulses arising from mental derangement.*"

Of this definition Judge Staples, speaking for the whole court, says:

"We think the rule here laid down is in accordance with the best authorities as well as the dictates of reason and justice."

If the court had desired to adopt the "right and wrong" test, it would have omitted the words:

"And possessed with all a will sufficient to restrain his impulses arising from mental derangement."

For if the "right and wrong" test is the true criterion, the will power is not considered, no matter how defective disease or mental frenzy may have rendered it. Under the "right and wrong" test no irresistible impulse venting its fury on friend and foe alike would excuse crime, if the wrong of the act was perceived.

At first glance it might be supposed that this definition in the Dejarnette Case was mere obiter dictum inasmuch as the definition was not prejudicial to the prisoner, but it must be remembered that the case was reversed and remanded for a new trial and that the emphatic approval given by the court to this instruction was in fact a direction to the lower court on the subsequent trial to adopt this definition. It seems to me that this gives the instruction the weight of an authoritative utterance. But if an obiter it was the obiter of Judges Staples, Anderson, Christian, Burke and Moncure. As Judge Staples himself once said in one of his able opinions, about a principle in an opinion, which had been questioned as obiter: "I do not know whether this opinion is obiter or not nor do I stop to inquire. It is the opinion of a great judge and as such I accept it."

Until a more authoritative utterance comes from the same high court I think any nisi prius judge can be content when he finds himself with these great judges. If the able judges of our present appellate court, adopt as a wiser and better policy any other view, I feel certain both bench and bar will acquiesce, and be entirely satisfied with their conclusions.

What the facts were in the Dejarnette Case are not material nor does the record disclose. It was reversed because the trial judge gave too great prominence in his charge to the jury to the homicidal mania over other forms of "brain storms." As to the facts, Judge Staples expressly says:

"We must of course accept it as true, that the defense of homicidal mania was relied upon in the court below. The record, however, does not *show this fact.* Neither in the testimony of witnesses, nor in the instructions asked for by the prisoner's counsel is there any special reference to this species of partial derangement. The effort of the defense seems to have been rather to establish the existence of *latent hereditary insanity* in the accused developed into active exertion by the *shock* he had received; but what form of mental aberration, whether homicidal mania merely, or *temporary derangement,* or general hallucination or delusion were relied upon, this record does not inform us."

It would rather seem from this that the "brain storm" true and simple, with perhaps a little dash of "hereditary" thrown in, was the real defense. But the facts of the case could not affect the definition, which the court in forcible terms said was in accordance with the best authorities as well as the dictates of reason and justice.

MOMENTARY INSANITY

It is insisted that a person cannot be sane the moment before the act, insane at the moment of the act, and sane again the moment after the act and that therefore the doctrine of irresistible impulses should be rejected.

But this temporary insanity is not confined to the definition of insanity which embraces irresistible impulses. It is as true of the "right and wrong" test, embraced in all definitions, as it is of the "irresistible impulse" test embraced in some.

In the New York Case adopting the "right and wrong" test it is said:

"Insanity need not exist for any definite period of time before the commission of the offense. It is only necessary that it exist at the moment when the act occurred with which the accused stands charged." Freeman *v.* People, 4 Denio 9; Flanagan *v.* People, 52 N. Y. 467.

The very definition of the English judges and of the American

cases adopting the English definition is that the capacity to distinguish between right and wrong must exist at the time of and "with respect to" the very act, which is the subject of inquiry. As to any other act of his life or at any other moment of his life he may be perfectly sane, but he is irresponsible, if insane at the moment of and with respect to the very act with which he stands charged. There has not been an authority, English or American, for at least a century which excludes momentary insanity. To obtain such an authority we must go back to Lord Coke and Lord Hale. But in those days the law hung little children, and women and men for offenses now deemed trivial. It is not surprising that it had a definition of insanity which hung idiots. In endeavoring to exclude the "brain storm" we should bear in mind that we may exclude that homicidal mania, which vents its fury on friend and foe alike, if accompanied with the capacity to know "right and wrong." All insanity is a disease of the mind but as seen may be of a very transitory character.

In several well-considered opinions in cases maintaining the "right and wrong" test it is pointed out that the distinction between the two tests is more shadowy, technical, and psychological than practical.

Prominent among the cases is State *v.* Harrison, 36 W. Va. 713, 15 S. E. 23. In a very able opinion by Judge Brannon establishing the "right and wrong" test for West Virginia, he thus discusses this phrase of the question:

"And if we are sure he was seized and possessed and driven forward to the act wholly and absolutely by irresistible impulse, his mind being diseased, how can we say he rationally realized the nature of the act—realized it to an extent to enable us to hold him criminal in the act. How can the knowledge of the nature and wrongfulness of the act exist along with such impulse, that shall exonerate him? Can the two co-exist? The one existing, does not the other non exist? Can we certainly say, that a person, who is really driven to such an act by such an impulse was capable at the instant of the act of knowing its true nature?"

Judge Brannon then concludes by saying:

"I know of no better rule than the 'right and wrong' test as *above stated.*"

As above stated the "right and wrong" test included an irresistible impulse. He gives the following reason why the court should not give the irresistible impulse in charge to the jury:

"It seems to me to be very dangerous to life to tell juries, that a party may know the nature of his murderous act, and know and be conscious that it is wrong and criminal and yet be excusable if he did the act at the command of irresistible impulse; thus eliminating the knowledge of the wrong of the act as an unessential, unimportant element in the test. I do not regard it essential to the safety of the parties accused."

This view is endorsed by various cases. It would seem to be a question according to this view of mere phraseological propriety.

In a note to Knight *v.* State (Neb.), 76 A. S. R. 78, the annotator pronounces strongly for the "right and wrong" test as being supported by the great weight of authority. But in the note to State *v.* Harrison (W. Va.), 18 L. R. A. 224, the annotator states that the cases are hopelessly divided. In 12 Cyc. 166, the definition is thus given:

"All of the courts, both in the United States and in England agree that a man is not criminally responsible for an act if at the time of its commission he was so insane, from disease or defect of the mind, that he was incapable of understanding the nature and the quality of the act, or of distinguishing between right and wrong, either generally or with respect to that particular act. Some of the courts hold that this is the only test of responsibility, while others, as we shall see, hold that a man may be irresponsible because of insane, irresistible impulse, although he knew the act was wrong."

And another paragraph says that the later cases show a tendency of the courts to adopt the latter view.

Even if it should appear that the case law on this subject was hopelessly divided, I can see no reason why the Dejarnette Case should not be given full authority. It is certainly as well supported as the other view. Is there anything reasoning a priori why it should be abandoned?

ANGER AND PASSION

Shall we abandon the true definition because anger and passion sometimes overmasters the will? Does not passion also becloud our moral perceptions and destroy our capacity to de-

cide righteously? This would seem to render one test as obnoxious as the other. The insane impulse is distinguished from passion in this, that the one, from a disease of the mind, supposes a lack of capacity to control; the other supposes the capacity but the failure to exercise the power. In the one case the ego has no will power to summon, in the other the ego has the will power but refuses to call upon it. Thus, too, the person at the time may not know the nature and quality of his act but he is responsible if he has the capacity to know. He is not responsible if he has not the capacity. Both the "right and wrong" test, and the test, which superadds thereto the irresistible impulse, presuppose a disease of the mind, an aberration of the intellect, fleeting it may be but existing, or permanent—it may be—even to heredity—which destroys "*capacity*." It is the duty of every one to exercise self-control and if possessing the power of control he allows his passions to dominate him he is responsible. Such a person is in a very different category from the person whose mental machinery has slipped a cog, as Mr. Bishop expresses it, and who is helplessly driven by an insane impulse, which he has no capacity to control.

In any given case the condition of the mind of defendant is a question of fact. It is the jury who determine his capacity or lack of it, no matter what test may be adopted. The jury is under our system of jurisprudence the tribunal to which matters of fact are submitted, and in this as in all other matters which the law has confided to it, I think it can with perfect safety be trusted. The fear that juries will give credence to a brain storm except in extreme cases is so slight that it hardly justifies the conviction of persons, who are clearly shown to be dominated by insane impulses. Certain forms of mania are clearly shown to exist, such for instance as kleptomania. If the "right and wrong" test include insane impulse then there seems no good reason why the jury should not be told so.

THE LOGIC OF THE FACTS

The reason that the law requires a person to have sufficient capacity to know right from wrong as to the very act is that he may refrain from doing wrong. But if by reason of mental aberration this knowledge avails him nothing it seems illogical

to attribute to him a responsibility which he would not have if he did not have the knowledge. It is abhorrent to the humane instinct to punish a person for an act which is the offspring solely of disease. Such a person is to be pitied, to be medically treated, not punished. Every definition which stops short of including every such unfortunate creature is defective. A definition which does, is, in the language of Judge Staples, "in accordance with the best authorities as well as the dictates of reason and justice."

In my judgment the Virginia case, the weight of authority and the better reason all concur in amending the "right and wrong" test by adding thereto the requisite of a will power sufficient to restrain the impulse arising from mental disease.

I hope I may be pardoned for saying that long before the Strother Case I had followed the Dejarnette Case in the trial of Joseph Copenhaver for the murder of his wife. There was no unwritten law feature in that case. In spite of the fact that Copenhaver had been twice confined in the State Hospital at Staunton, that prominent alienists, including Drs. Blackford and Dejarnette, testified in his favor, he was convicted and a writ of error was refused in his case. He recently died in the penitentiary to which he was sentenced for fifteen years.

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